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# Supreme Court of the United States

October Term, 1964

No. 880.

VILLAGE ON THE HILL, INC.,
*Petitioner,*
v.
MASSACHUSETTS TURNPIKE AUTHORITY
AND
RIVETT LATHE & GRINDER, INC.,
*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS.

## BRIEF FOR RESPONDENT RIVETT LATHE & GRINDER, INC., IN OPPOSITION.

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# Supreme Court of the United States.

OCTOBER TERM, 1964.

No. 890.

VILLAGE ON THE HILL, INC.,
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*v.*

MASSACHUSETTS TURNPIKE AUTHORITY

AND

RIVETT LATHE & GRINDER, INC.,
*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS.

## BRIEF FOR RESPONDENT RIVETT LATHE & GRINDER, INC., IN OPPOSITION.

Respondent Rivett Lathe & Grinder, Inc. (hereinafter called "Rivett"), opposes the petition for a writ of certiorari to review the judgment of the Supreme Judicial Court for the Commonwealth of Massachusetts entered in the above-entitled action on November 12, 1964.

### Jurisdiction.

The petition for certiorari alleges that "the jurisdiction of this Court is invoked under 28 USC § 1257(3)" (Petition,

p. 2). This section authorizes this Court to review State Court decisions where, among other things, "any title, right, privilege or immunity is . . . claimed under the Constitution . . . of . . . the United States." No such question is here involved. As clearly appears from Appendix E of the petition, entitled "The Raising of the Federal Question," the petitioner, plaintiff below, made certain allegations in its bill in equity substantially to the effect that the defendant Massachusetts Turnpike Authority (hereinafter called "MTA") did not deem it necessary to take petitioner's land to construct, operate and maintain a turnpike or to reconstruct a portion of a private way, Newton Street, but took it for the purpose of selling it to Rivett for the private use and accommodation of Rivett; that the MTA and Rivett, acting in concert, were in the process of carrying out a preconceived plan to deprive petitioner of its property for the sole benefit of Rivett, when there was no public need; that the MTA and Rivett acted in bad faith, misusing the powers of eminent domain entrusted to the MTA and are attempting to deprive the petitioner of its property in violation of Article 10 of the Massachusetts Constitution and the Fourteenth Amendment of the Federal Constitution; that their proposed plan is discriminatory, beyond the powers of the MTA and clearly illegal (Petition, App. E, pp. E-1, E-2).

The Massachusetts Superior Court, the trial court, after lengthy hearings, found and ruled:

> "I rule that the Turnpike Authority, by implication, was granted the power to re-locate and extend portions of a private way if, as in this case, such relocation was necessary as a result of the change of location of that portion of Newton Street which was a public highway. I find that the final plans extending and re-locating that portion of Newton Street which

was a private way was done by the engineers and the Turnpike Authority in good faith and according to sound engineering principles.

"I find and rule that the Massachusetts Turnpike Authority did not take the Petitioner's land for the purpose of sale or lease of the same to Rivett, Lathe & Grinder, Inc. for its private use or accommodation. I find and rule that the Massachusetts Turnpike Authority did not take land of the Petitioner under the guise of public need with a design of depriving the Petitioner of its property for the private need of Rivett, Lathe & Grinder, Inc." (Petition, pp. 10-13, App. C, p. C-10)—

and thereupon entered a final decree as follows:

"1. That the taking by the Massachusetts Turnpike Authority of the property of the Petitioner was a taking for a public purpose and not for the private need of Rivett, Lathe & Grinder, Inc.

"2. That the taking by the Massachusetts Turnpike Authority of the property of the Petitioner was a valid exercise of the power granted to the said Authority by the General Court." (Petition, App. C, p. C-13.)

The petitioner appealed to the Massachusetts Supreme Judicial Court, which affirmed the final decree of the trial court (Petition, App. B, p. B-1), and in its opinion stated:

"1. The case was heard upon evidence consisting of numerous exhibits and voluminous oral testimony. The ultimate conclusions of fact of the trial judge are supported by his subsidiary findings and are not shown by the reported evidence to be plainly wrong in any material respect." (Petition, App. A, p. A-8.)

It is obvious that the petitioner's allegations in its bill in equity were not found to be true and therefore constitute no more than unfounded allegations. In this petition the petitioner in effect is asking this Court to find the facts differently from the facts found by the Massachusetts Superior and Supreme Judicial Courts. To be more precise, since the only witnesses who testified as to the transactions between MTA and Rivett were the president of Rivett, officers of the MTA, and employees of independent engineering firms employed by MTA to lay out the takings and relocate Newton Street, all of whom expressly denied the truth of the allegations of the petitioner, it is really asking this Court to disbelieve the witnesses and make inferences exactly contrary to the express testimony in the case.

Clearly this raises no substantial federal question under 28 U.S.C. § 1257 (3). At the most it raises a question of whether the findings were supported by the evidence. In a recent case in which similar factual issues had been decided against the appellant, his appeal to this Court was summarily dismissed. *Grisanti* v. *City of Cleveland*, 371 U.S. 68, 83 S. Ct. 111 (1962).* For the same reasons, this petition should be summarily denied.

## Questions Presented.

As stated previously, the petitioner brought a bill in equity, under the Massachusetts Declaratory Judgment Act (Massachusetts General Laws, c. 231A), seeking a declaration of the rights of the parties growing out of the

*The proceedings below and the facts in this case may be found in *Grisanti* v. *City of Cleveland*, 180 Ohio 2d 143, 179 N.E. 2d 798; affirmed by Court of Appeals of Ohio in 89 Ohio Abs. 1, 181 N.E. 2d 299, and by the Supreme Court of Ohio in 173 Ohio St. 386, 182 N.E. 2d 568.

taking by the MTA of certain portions of land belonging to the petitioner. The gist of the claim was that the defendants acted in concert so that the MTA took by eminent domain the petitioner's property "for the private use and benefit of" Rivett (Petition, p. 3).

The case was heard at length by a judge of the Superior Court of Massachusetts, who filed extensive findings of fact, culminating in the ultimate findings that the MTA did not take the petitioner's land for the purposes of sale or lease of the same to Rivett for its private use or accommodation or under the guise of public need with a design of depriving the petitioner of its property for the private need of Rivett (Petition, App. C, p. C-10). The trial court entered a final decree in accordance with the foregoing findings (Petition, App. C, p. C-13), whereupon petitioner appealed to the Massachusetts Supreme Judicial Court.

That Court, after hearing, filed an opinion in which, among other things, it held that "The ultimate conclusions of fact of the trial judge are supported by his subsidiary findings and are not shown by the reported evidence to be plainly wrong in any material respect" and that the MTA had ample power to take the land in question for the purposes stated in the order of taking (Petition, App. A, p. A-8).

In such circumstances the only question presented to this Court is whether the ultimate finding of the trial court, based upon extensive testimony and supported by its subsidiary findings of fact that the MTA did not take land of Village, Inc., for the private use or accommodation of Rivett, which ultimate finding of fact has been reviewed and sustained by the highest court of the Commonwealth of Massachusetts, constitutes a deprivation of the property of Village, Inc., without due process of law, in violation of the Fourteenth Amendment to the United States

Constitution, having in mind that under the Massachusetts Constitution and statutes, G.L. c. 79, §§ 6 and 12 (Appendix A, p. 26), the MTA is obligated to pay to the petitioner the fair cash value of property taken from it by eminent domain.

Merely to state the question discloses not only that it is not a federal question, but also that it must be answered in the negative.

**Constitutional Provisions and Statutes Involved.**

In addition to the constitutional provisions and statutes set forth in Appendix D to the petition, additional provisions of the Massachusetts statute conferring powers upon the MTA and of the statutes dealing with damages in eminent-domain proceedings are set forth in Appendix A hereto.

**Statement.**

A. Findings of the Trial Court.

As indicated above, the trial court filed an extensive opinion and made findings of fact which were affirmed by the Massachusetts Supreme Judicial Court. Such findings of fact are complete and accurate in all respects, and we are therefore quoting substantially all of the trial court's findings as the statement of facts and have inserted after each finding of fact the reference to the pages of the record and to the exhibits which support such findings.*

*In so doing we adopt the method of referring to the record set forth in footnote 1 on page 2 of the petition. The findings as originally made (2R. 355-363) were amended in certain minor respects (2R. 366), and we are reproducing them in their amended form. The findings, the order amending them, and the final decree of the trial court are also printed as Appendix C to the petition.

"The Massachusetts Turnpike Authority by order of taking designated as No. B37 [Exhibit A to plaintiff's bill in equity, 1 R. 8-18], dated October 18, 1962 and recorded in the Land Court in Suffolk Registry District on November 7, 1962, purported to take in fee simple certain land of the plaintiff described in said order and certain permanent easements in the land of the plaintiff further described in said order, which recited that the taking was 'for the purpose of constructing, maintaining, repairing and operating as an express toll highway in accordance with the location approved by the State Department of Public Works on April 12, 1960, a road in the City of Boston, County of Suffolk, "Boston Extension" of the Massachusetts Turnpike, and for the purpose of relocating public utilities, rail lines in connection therewith; for the purpose of relocating and constructing a portion of a private way (Newton Street) and for the purpose of performing such other work as may be deemed necessary in connection therewith . . .' [1R. 8-9].

"Rivett, Lathe & Grinder, Inc. owned and operated, for many years, a plant at 20 Riverview Road, Brighton (1R. 37]. Its president, Mr. Albert Hunt [1R. 36], first heard that the plant was in danger of being taken for the extension of the turnpike sometime in 1957 [1R. 38] at which time, after a meeting with Mr. William Callahan, the Chairman of the Turnpike Authority [1R. 39], was advised to begin to look for possible sites upon which to relocate his plant [1R. 39, 117-119]. He examined sites in Lowell, Brockton, Lexington, Waltham [1R. 117, 119] and in July of 1959, he and his wife purchased a parcel of land in Waltham [1R. 52] and gave an option to Rivett, Lathe & Grinder, Inc. to repurchase it for a plant site at the same price which he and his wife had paid. An engineering firm, Lockwood and Greene, was engaged to prepare a preliminary study of plant requirements including area and plant

lay-out [1R. 52, 53]. Interest lagged for a while when the plans for selling the turnpike bonds were postponed, but in January or February of 1961, Hunt went to the office of the Massachusetts Turnpike Authority to inquire about any possible changes in plans [1R. 118] and was given a copy of a plan dated March 14, 1960 (Exhibit 13B)* which indicated that the railroad tracks were to be moved toward the river, the turnpike would be located to the south of the railroad and that it would go right through the location of his plant [1R. 117, 118]. Sometime in March of 1961, a representative of the Massachusetts Turnpike Authority indicated to Mr. Hunt that there might be surplus land in the so-called Faneuil Dump area and would be available for building purposes [1R. 118]. This area consisted of land owned by the Boston & Albany Railroad [Exhibit 13A] which the Massachusetts Turnpike Authority had a right to purchase. Several conferences took place at which Hunt indicated that he would be interested in relocating his plant in this area depending upon factors such as test boring, utilities and access roads [1R. 118-120]. Because the turnpike bonds did not sell until March of 1962 [2R. 287] nothing further was done until mid-July 1962 when Lockwood-Greene prepared a sketch (Exhibit 12) [1R. 59, 121, 3R. 22] showing a proposed plant within the confines of the Faneuil Dump area previously owned by the Boston & Albany Railroad.†

"Several meetings were held among members of the Turnpike Authority and Hunt during mid-September of 1962 [1R. 123-128, 131-136] at which a price for damages for the old property was agreed upon [1R. 132] and at

*Mr. Hunt's testimony was that he actually received this plan and another plan of the same date showing land further to the west (Exhibit 13A) in April, 1962 (1R. 120). These exhibits are reproduced in 3R. at pp. 23 and 24.

† This plan was prepared from Exhibits 13A and B (1R. 121).

which Hunt indicated that, subject to the approval of the Board of Directors, Rivett, Lathe & Grinder, Inc. would purchase a portion of land in the Faneuil Dump area for one hundred thousand dollars ($100,000.) if access and utilities were provided for [1R. 135-136, 190].

"A meeting was arranged by William Callahan with Mayor Collins [1R. 79, 136] at which time Mr. Hunt explained to the Mayor that he preferred to relocate his plant in the Brighton area since a survey of his personnel had shown that they would rather work in this area where most of them lived [1R. 137]. Nothing was said at this meeting about the Massachusetts Turnpike Authority taking private land [1R. 73-74]. The Mayor indicated that he was anxious to retain industry in Boston [1R. 138] and after a discussion of tax assessments Hunt held several meetings with Mr. Brauneis, the Commissioner of Assessing, culminating in a letter dated October 4, 1962 setting forth proposed assessments for the years 1963, 1964, 1965 [1R. 138-139, Exhibit 18].

"At one of the meetings in mid-September, Hunt was told by Mr. Callahan that the proposed relocation of Newton Street would not continue as previously planned to the Newton City line but would stop somewhere in the Faneuil Dump area and that a reserve strip would have to be retained for the future extension of this road into Newton [1R. 134]. At this time Mr. Hunt had no precise knowledge as to the exact location of the new re-located Newton Street [1R. 134, 135]. As a matter of fact, as will be developed later, the precise plans and working drawings for relocated Newton Street were being developed by the engineers during a period beginning at the middle of June 1962 and running through the Spring of 1963 when final approval of utilities locations were approved [1R. 262-278, 290].

"Because of the location of re-located Newton Street decided upon by the engineers it turned out that it would be impossible to locate the Rivett, Lathe & Grinder, Inc. plant wholly on former railroad land as shown on Exhibit 12 [1R. 142-144]. The re-location of Newton Street, as finally determined, deprived Rivett, Lathe & Grinder, Inc. of some 44,000 square feet of relatively level land and necessitated adding a similar area including a hillside rising approximately 30 feet above the average ground level and required the use of some of the land to support the slope of re-located Newton Street [Exhibit 24, 3R. 29]. In addition, data obtained from more ground test borings showed that the foundation cost of the building would be more than anticipated [Exhibit 24]. As a result of these considerations, the purchase price agreed on for the land to be bought by Rivett, Lathe & Grinder, Inc. was reduced to eighty thousand ($80,000.) dollars. (See Exhibits 24, 25 & 26). [3R. 27, 18-20.] A formal purchase and sale agreement (Exhibit 15) [2R. 377] was entered into between the Massachusetts Turnpike Authority and Rivett, Lathe & Grinder, Inc. dated January 17, 1963 [3R. 377]. I find that the execution of this agreement was duly authorized by the Turnpike Authority [1R. 154] and by the Board of Directors of Rivett, Lathe & Grinder, Inc. [1R. 145, 146]. It should be noted that the land to be sold and purchased under this agreement is not the same as outlined in red on the plan dated October 9, 1962 [1R. 141], attached to the purchase and sale agreement but rather includes an area between the southerly border of the former Boston & Albany land and the northerly side of re-located Newton Street. The area actually to be conveyed is properly described in the purchase and sale agreement [2R. 377-378]. It should also be noted that Exhibit 15 places the time for performance as sixty days after the Massachusetts Turnpike Authority obtains the land of others [2R. 379] and

also provides that Rivett, Lathe & Grinder, Inc., at its own risk and expense, may enter upon the property for the purpose of site preparing or construction of its new plant as soon as the Authority obtains title to such portion of the premises which were not then owned by the Authority [2R. 380]. The land of the petitioner Village on the Hill, was as previously stated, taken by the Turnpike Authority on October 18, 1962. To date there has been no conveyance of the premises from the Turnpike Authority to Rivett, Lathe & Grinder, Inc. and the legal title to the premises including the building which is in the process of being constructed thereon therefore remains in the Massachusetts Turnpike Authority although I find that it is the present intention of the parties to go through with and fulfill the terms of the purchase and sale agreement (Exhibit 15) [1R. 65, 66]. By letter dated December 4, 1962, (Exhibit 32) [3R. 32], it had been indicated by the Turnpike Authority that there would be no objection to Rivett, Lathe & Grinder, Inc. proceeding with construction of the building on the proposed site [1R. 197].

"At the time of the view taken by the Court the manufacturing building being constructed for Rivett Lathe & Grinder, Inc. was nearing completion and ready for the installation of machinery of the said Rivett Lathe & Grinder, Inc. The parking lot adjacent to and to be used with the said building had been staked out and graded in rough form. Work has continued on the building and parking lot during and subsequent to the hearings [1R. 65].

"In the meanwhile, meetings had been held among Hunt, representatives of the Turnpike [1R. 125, 128] and representatives of Perini Corporation, the General Contractor for the toll road extension [1R. 129-131] relative to the time when Rivett, Lathe & Grinder, Inc. would have to vacate its old plant. Rivett, Lathe & Grinder, Inc. agreed with representatives of Perini that it would be out of its

old plant within six months after construction started on the new plant [1R. 131]. Lockwood-Greene was unable to prepare a plan for a plant and complete construction within a six month period [1R. 139]. Mr. Hunt, therefore, looked into the feasibility of constructing a prefabricated plant [1R. 140] and on October 8, 1962 engaged the services of Carlson Construction Corp. [1R. 44, 141], the local representative of Butler Manufacturing Co. (Exhibit 8) [2R. 376]. A formal contract between Carlson Construction Corp. and Rivett, Lathe & Grinder, Inc., dated December 5, 1962 [1R. 45] was signed on January 2, 1963 (Exhibit 9).* In the application for building permits made by Carlson Construction Corp. to the City, it was indicated that Rivett, Lathe & Grinder, Inc. was the owner of the building [1R. 201]. I find that the representatives of the Carlson Construction Corp. were not aware of the legal niceties of the situation in which title had not yet passed to Rivett, Lathe & Grinder, Inc. but considered Rivett, Lathe & Grinder to be the owner in view of the agreement that construction could start on the site [1R. 201-202].

"The plans from which the building is being constructed and is located on the ground were prepared by Carlson Construction Corp. in October of 1962 [1R. 143-144]. The Carlson Construction Corp. started the work of clearing and site preparation on November 14, 1962 [1R. 204]. During December 1962, many car loads of materials were delivered to the site and two cranes were working there [1R. 209-211]. I find, however, that petitioners are not barred by laches as a result of obvious work or construction going on at this time.

"Before the work on the Turnpike extension was undertaken, Newton Street was a public way from Brooks Street

*This exhibit has not been reproduced in the Record.

to approximately the point where it joined with Charlesview Street [2R. 247]. From this point proceeding in a westerly direction old plans show a private way called Newton Street leading to the property of the Boston & Albany Railroad [2R. 353].* This private way part of Newton Street was a paper street only and had never been developed. As a result of re-locating the railroad tracks it became necessary (as shown on Exhibit 13C)† to re-locate a part of Newton Street that was the public way.

"The original plans for the Turnpike extension were made from assessors plans and U.S. Geodetic maps which did not show a great deal of detail or topographical data and were made only for the purpose of planning the general line and location of the turnpike extension [2R. 240, 289, 337-338]. This line and location of the Turnpike extension was approved by the Department of Public Works in 1960 [1R. 32, Exhibit 2, Pl. Br. p. 43]. Naturally after the bonds were sold and the time came for actually constructing the extension more detailed data were necessary and actual on the ground studies and surveys were made [1R. 240]. Howard, Needles, Tamen and Bergendoff designed the turnpike extension [1R. 236]; DeLeuw, Cather & Co. were subcontractors under Howard, Needles to prepare construction plans [1R. 237]. The original plans made in 1960 showed Newton Street extended through the former railroad property continuing on a straighter (less curved) line westward into Newton [Exhibits 13A and 13B, 3R. 23, 24]. However, in June of 1962, detailed studies were undertaken by DeLeuw, Cather & Co. to determine

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*Private-way Newton Street also appears on a number of not-so-old plans, *e.g.*, the plans attached to plaintiff's certificates of title, Exhibits 5A and 5B (3R. 9, 13, 17).

† Exhibit 13C has not been printed. See also Exhibit 2 (Pl. Br., p. 43).

the best way to re-locate and extend Newton Street [2R. 263-264] (see Exhibits 47, 48, 49) [3R. 46-49]. On July 26, 1962, DeLeuw, Cather & Co. forwarded to Howard, Needles its proposed plan (Exhibit 53) [3R. 56] for the re-location and extension of Newton Street. This was the first plan in which the Newton Street extension was made to swing in a southerly direction beyond the Boston & Albany Railroad property, which necessitated the taking of the land of the Petitioner [2R. 266].* As of June 11, 1962 (see Exhibit 45) [3R. 44], instructions had been given that Newton Street was not to be extended over the City of Newton line but was to serve only the Faneuil yard area [2R. 262]. In this letter it was also suggested that in order to avoid affecting a nursing home under construction on Bigelow Street that it would be necessary to re-locate Newton Street further north than originally planned [2R. 262]. Because of the hilly nature of the land in this area 'the top of the cut' in the original plan would have affected the nursing home [2R. 262]. On the original (1960) plan for extending Newton Street [Exhibits 13A and 13B, 3R. 23, 24] the grade at its connection with Charlesview would have been excessive (in excess of 10%, see Exhibit 52) [3R. 55]. When Newton Street was relocated farther north to avoid the nursing home, the grade of Newton Street up to its connection with Charlesview Street was increased so that its high point was at or about its connection with Charlesview [2R. 267]. Once this was done, from an engineering standpoint, it was also necessary to bring the Newton Street extension toward Presentation Road in order to

*It is possible to infer from this statement that no earlier plan for the relocation of the Newton Street extension would have required the taking of any of the petitioner's land. However, an examination of the S.J.C. Plan (Petition, Appendix A, p. A-3) indicates clearly that, even under the 1960 plan, some portion of the plaintiff's land would have been taken.

avoid excessive fill and excessive grade down into the former railroad property and also to provide for a more level connection with Presentation Road and Tilton Street, when and if they are extended to meet Newton Street as relocated [2R. 268, 333]. *I find that in determining the location and direction of re-located Newton Street that DeLeuw, Cather & Co. acted according to its best judgment based upon sound engineering principles* [2R. 286, 333] *and in no way was influenced to attempt to circle the former railroad property in order to provide a location for the new Rivett, Lathe & Grinder, Inc. plant* [2R. 288, 289, 292, 343, 349-350]. *As a matter of fact, as previously narrated, the decision to sell property for a plant site for the new Rivett, Lathe & Grinder, Inc. plant was not made by the Turnpike Authority until sometime in September of 1962* [1R. 135-136]. [Emphasis supplied.] Once the decision was made and approved as to where to re-locate and extend Newton Street, further studies and plans had to be drawn in order to accurately delineate the taking of the Petitioner's land [2R. 263]. This necessitated a good deal of time and work and made necessary a delay in the actual takings of the Petitioner's land [2R. 262-280; Exhibits 45-62, 3R. 45-71].

"The possibility that at sometime in the future the City of Newton might wish to have Newton Street extended into Newton itself made it necessary for the engineers and the Turnpike Authority to reserve a strip of land as shown on the plan attached to Exhibit 15. I find that it is only coincidence that the Newton Street extension ends at the approximate point of the parking lot to be built in connection with the new Rivett, Lathe & Grinder, Inc. plant [2R. 286]. The final plans for the re-location and extension of Newton Street necessitated the taking of only a little more private property than would have been necessary if Newton Street had been extended as originally planned in 1960. However, the plan as finalized made it necessary to take the property

belonging to the petitioner rather than property belonging to others further to the east.* Once the decision was made to avoid taking property which would affect the nursing home and other private houses in the Bigelow Street area it became necessary to change the grade of Newton Street in the vicinity of Charlesview Street and this necessitated extending Newton Street through the land of the Petitioner rather than down a steep hill into the former railroad property [2R. 268, 333].

"I find that no part of the old private way which was known as Newton Street (paper street) is being used for the turnpike extension itself nor for the railroad easement nor for the purpose of re-locating any public utilities. I further find that at the time of the taking of the Petitioner's land the engineers planning the Turnpike, and the members of the Turnpike Authority knew that no part of the Petitioner's land was to be used for the Turnpike Extension itself (actual roadway), or for the Railroad easements, or for the re-location of any public utilities; I find that the Department of Public Works, on or about August 28, 1962, approved the re-location of that part of old Newton St. which was a public way [1R. 32, Exhibit 2, Pl. Br., p. 43] but has never been requested to approve the relocation or extension of that part of Newton Street which was a private way. I rule that there is no statutory necessity for Department of Public Works approval of the re-location of a private way.

[The court then quotes from chapter 354 of the Acts of 1952, § 7, printed in Appendix D to the Petition, p. D-3.]

"The taking of the land of the Petitioner was made in the name of the City of Boston [Exhibit A to Plaintiff's Bill,

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[*This can be most easily seen by an examination of the plan printed as part of the opinion of the Massachusetts Supreme Judicial Court. Petition, App. A, p. A-3.]

Section 4, 1R. 12-15]* and the City approved the location of Newton Street extended and the plans for the utilities therein [1R. 238-239].

"However, as pointed out above, the Turnpike Authority, in this case, not only changed the location of a portion of a public highway, but also changed the location and extended that part of Newton Street which was a private way and had formerly existed only on paper. I rule that the Turnpike Authority, by implication, was granted the power to re-locate and extend portions of a private way if, as in this case, such re-location was necessary as a result of the change of location of that portion of Newton Street which was a public highway. I find that the final plans extending and re-locating that portion of Newton Street which was a private way was done by the engineers and the Turnpike Authority in good faith and according to sound engineering principles.

*"I find and rule that the Massachusetts Turnpike Authority did not take the Petitioner's land for the purpose of sale or lease of the same to Rivett, Lathe & Grinder, Inc. for its private use or accommodation. I find and rule that the Massachusetts Turnpike Authority did not take land of the Petitioner under the guise of public need with a design of depriving the Petitioner of its property for the private need of Rivett, Lathe & Grinder, Inc."* (2R. 363.) (Emphasis supplied.)

A somewhat shorter statement of the facts, but an accurate and complete statement, appears in the opinion of the Massachusetts Supreme Judicial Court in Appendix A of the petition at pages A1-A8. This statement contains a

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[*Not all of the petitioner's land was taken in the name of the city. For example, the land described in section 1 of this exhibit, which was taken by the Turnpike, includes land of the plaintiff (1 R. 10).]

most helpful plan of the locus at page A3,* as well as explanatory footnotes. We will not reproduce this statement here, but incorporate it by reference.

### B. Correction of Errors in Petition.

It will be noted at once that in a number of respects the facts as found by the Massachusetts courts vary substantially from the statement of facts set forth on pages 3-10 of the petition. While we will not enumerate all of these variances, there are certain misstatements which are so material as to require correction.

(1) On pages 4 and 5 of the petition it is stated: "Hunt [president of Rivett] was well aware [in July, 1962] that private land would therefore be needed for the site (1R. 60, 85)." Neither of the record references supports this assertion. The most that can be said was that in July, 1962, Hunt had received from the MTA plans (Exhibits 13A and 13B, 3R. 23-24) of the entire area, on which his engineers—unknown to the MTA (2R. 254, 280, 351)—laid out a possible location for a plant (Exhibit 12, 3R. 22). If one examines these exhibits closely, it can be seen that a small portion of the proposed plant extends over a line which is marked "Existing B & A [railroad] Property Line." Taken at face value, this would indicate that, if the plant were built as then laid out on that sketch, a part of it would lie on land other than former railroad land, but Hunt did not know it was owned by plaintiff. Indeed, so far as Hunt knew at that time, this could have been land already owned by the Turnpike or under contract for purchase by it from some other owner, as was the case with the Railroad land.

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*Hereafter referred to as the "SJC Plan."

(2) On page 5 of the petition petitioner states that the proposal of the subcontractors to the MTA consulting engineers for the revised relocation and extension of Newton Street "was such as to necessitate taking a portion of the petitioner's land." Taken literally, this statement is true, but in the context in which it is made there is an inference that it was the revised relocation that occasioned the taking of a portion of petitioner's land. Actually, as can be seen from the S.J.C. Plan, the *1960* proposal for the relocation of Newton Street required taking a portion of the petitioner's land. The 1960 proposal was made a year before March of 1961 when the possibility of Rivett's buying MTA land for a new factory was just mentioned (1R. 118). The revision made in June or July of 1962 of the layout of Newton Street resulted in more of the petitioner's land being taken in one area (Area No. 2 on the S.J.C. Plan) and substantially less in two other areas (Area Nos. 1 and 3 on the S.J.C. Plan). *For present purposes it is extremely important to note that all of the land on which the Rivett building was finally erected was included in the 1960 proposal* (2R. 320).

(3) On page 7 of the petition it is stated that "Rivett's proposal [of October 29, 1962] to relocate its plant further to the right of the old site in the Faneuil Dump area required the taking of more of petitioner's land than was originally planned on July 19." This statement is wrong thrice over. In the first place, as the record clearly establishes, there was no change whatever in the land to be taken under the plan for the Newton Street Extension which was made in June and July of 1962 and the land which was actually taken in the fall of 1962 (2R. 280). Secondly, the SJC Plan indicates clearly that, while the July, 1962, plan required the taking of slightly more land of the petitioner in one area of the proposed relocation than had been planned in 1960, that plan also involved the taking of less

land from the petitioner in other areas. While there is no direct evidence as to the net result, the plan itself would indicate that Village, Inc., gained about as much as it lost. Finally, and most important, the statement implies that it was the relocation of the plant further to the right that occasioned a taking of the petitioner's land, but the record (1R. 142-144) clearly establishes, and the trial judge found (2R. 358, *supra*, p. 10), that the converse is true, viz., it was the change in the area of the land to be taken occasioned by the June, 1962, revision of the relocation of Newton Street that required the change in the location of the plant.

(4) On page 9 of the petition it is stated that "in accordance with the October 29 plan . . . MTA undertook to construct relocated Newton Street to serve as an access to Rivett . . ." We have already pointed out that the MTA had planned to construct relocated Newton Street to serve as an access to the Faneuil Dump Area as early as 1960 (Exhibits 13A and B, 3R. 23, 24) By October of 1962 it had become clear that in fact Rivett was to occupy the Faneuil Dump Area, but the inference that the MTA constructed Newton Street at the behest of Rivett is wholly erroneous.

**Reasons for Denying the Writ.**

A. The only question presented by the petition is one of fact which should not be reviewed by this Court.

The basic and fundamental reason for denying the writ in the present case is that, once the facts are clearly understood, it is apparent that what Village on the Hill, Inc., the petitioner, is asking of this Court is that it review and reverse a factual determination to the effect that the property in question was not in fact taken for the private use and benefit of Rivett. This issue is not one which presents

any special and important reasons why this Court should exercise its discretionary power of review. *Southern Power Co.* v. *North Carolina Public Service Co.*, 263 U.S. 508, 44 S. Ct. 164 (1924). *Houston Oil Co. of Texas* v. *Goodrich*, 245 U.S. 440, 38 S. Ct. 140 (1918). While the questions involved have significance for the parties, they involve no "principles the settlement of which is of importance to the public as distinguished from that of the parties." *Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U.S. 387, 393, 43 S. Ct. 422 (1923).

B. The record supports the finding made by the trial court and approved by the Supreme Judicial Court of Massachusetts that the taking of petitioner's land was for a public purpose.

Even if this Court were to review the determination made by the trial court, however, it would find, as did the highest court in Massachusetts, that such determination is clearly supported, if not required, by the reported evidence. The S.J.C. Plan clearly illustrates that (1) the land taken from the petitioner on which the Rivett plant is now located was a part of the area which the MTA had determined to take in 1960, long before Rivett and the MTA ever thought of the purchase or sale of MTA land to Rivett (2R. 320), and (2) practically all of the land ultimately sold to Rivett was not land which had been taken from the petitioner, but was land which was purchased by the MTA from the railroad in a transaction which no one now questions (Petition, p. 4). Furthermore, it is abundantly clear from the record that the layout of Newton Street which determined the land to be taken from Village, Inc., was established solely by DeLeuw-Cather, an independent engineering firm acting as consultant to the MTA on the basis of its best judgment and engineering knowledge, and was designed to meet the problems of grade and future street and utility connections and had nothing to do with Rivett (2R. 267-269). In

fact, at the time the changes were made, none of the personnel concerned had any idea that Rivett had any interest in the area (2R. 254, 280, 351).

The 1960 plan for the relocation of Newton Street was modified in 1962 to take account of the engineering problems arising out of the steep grade in the vicinity of Charlesview Street and the decision not to extend Newton Street beyond the Boston city line at that time (2R. 267-269). With these factors in mind, the relocation of Newton Street was finally established and put on a plan dated July 26, 1962 (Exhibit 53, 3R. 56). The final location of Newton Street, the taking lines delineating the area necessary to be taken for this purpose, and the precise areas of the land to be taken were all established some months prior to and, in any event, no later than this date (2R. 270, 280).

It was over a month after this date that the actual negotiations between Rivett and the MTA for the purchase of the land took place (1R. 125-136). These negotiations culminated in agreement to the purchase by Rivett of the railroad land and the small portion of the land to be taken from the petitioner which would be isolated by the construction of Newton Street (1R. 135-136), but it is abundantly clear that, if Rivett had never appeared on the scene at all, the property of the petitioner which was taken in Order of Taking B-37 (Plaintiff's Bill in Equity, Exhibit A, 1R. 8-18) would have been taken in any event.

The record clearly establishes, and the trial judge found, that the MTA planned from the very beginning to relocate Newton Street so as to provide access to the Faneuil Dump area and to connect with future streets in Newton (see Exhibits 13A and 13B, 3R. 23, 24). There can be no serious doubt that these purposes are public purposes (see, *e.g.*, *Rindge Co.* v. *County of Los Angeles*, 262 U.S. 700, 705-707, 43 S. Ct. 689 (1923); *Luke* v. *Massachusetts Turnpike Authority*, 337 Mass. 304, 149 N.E. 2d 225 (1958)), and both the

trial court and the highest court of Massachusetts so held. None of the cases cited in the petition have any tendency whatever toward a contrary conclusion.* In such circumstances this Court should accept the judgment of the Commonwealth of Massachusetts on this matter as expressed through its highest court. *Union Lime Co.* v. *Chicago & Northwestern Railway Co.*, 233 U.S. 211, 218, 34 S. Ct. 522 (1914). *Hairston* v. *Danville & Western Railway Co.*, 208 U.S. 598, 607, 28 S. Ct. 331 (1908). No argument has been made, and indeed no argument could be made successfully, that it was not within the powers of the Massachu-

*In *Missouri Pacific Railway Co.* v. *Nebraska*, 164 U.S. 403, 17 S. Ct. 130 (1896), as the Court pointed out, the order "was not, and was not claimed to be, either in the opinion of the court below, or in the argument for the defendant in error in this court, a taking of private property for a public use under the right of eminent domain." (Page 416.) In *Rindge Co.* v. *County of Los Angeles, supra*, this Court held that a highway was a public use even though it came to a dead end, and that the resolutions of the legislative body to the effect that the taking in question was necessary in the public interest were conclusive on this question. In *Opinion of the Justices*, 261 Mass. 556, at pages 611-612 (159 N.E. 70, at page 83) (1928), the Massachusetts Supreme Judicial Court held that the Boston Elevated Railway Company could not be required to sell its assets to the Commonwealth under proposed legislation which expressly provided for the transfer of such assets to a new private corporation. The only question presented in *Porter* v. *Charleston*, 65 F. Supp. 224 (S.D. W. Va. 1946), was whether the city could evict tenants of property taken for playground purposes without getting a permit from the Office of Price Administration. In *Duluth* v. *Duluth Street Railway*, 179 Minn. 548, 229 N.W. 883 (1930), the Minnesota court disagreed with a city council resolution declaring that public convenience and necessity required extension of a street railway. In *Board of Education* v. *Baczewski*, 340 Mich. 265, 65 N.W. 2d 810 (1954), the state court held that a jury's determination of the necessity for the taking (such determination being required by the Michigan Constitution) could be reversed where the jury had proceeded on the wrong theory and where the errors complained of were such as could fairly be said to have controlled the result.

setts legislature to pass an Act enabling the MTA to take land by eminent domain and to permit it to sell any unneeded land taken. It was the MTA's right, if not duty, to consider the cost of acquiring that which would be needed permanently, and it was perfectly proper to take the relatively small portion that was to be cut off and isolated if "in reference to the probable damages that would be awarded for a jury [to the balance of the property] . . . and for interference with the use of it, this seemed reasonably necessary to an economical management of the business in their charge." *Boston* v. *Talbot*, 206 Mass. 82, at 92, 91 N.E. 1014 (1910). The Act itself (sections 5 (*k*) and 7, Petition, App. C, pp. D-2, D-3) provides that property shall be taken under chapter 79 of the General Laws of Massachusetts, which in turn clearly requires payment of adequate compensation (Mass. General Laws c. 79, §§ 6, 12, App. A, p. 26).

In the light of the foregoing it is abundantly clear that there has been no violation of the Fourteenth Amendment.

**Conclusion.**

The petition for a writ of certiorari should be dismissed.

Respectfully submitted,

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## Appendix A.

### Constitutional Provisions and Statutes Involved.

1. Massachusetts Statutes, 1952, Chapter 354, as Amended by Massachusetts Statutes, 1955, Chapter 47, and Massachusetts Statutes, 1958, Chapter 384.

Section 3. *Massachusetts Turnpike Authority.*—There is hereby created and placed in the state department of public works a body politic and corporate to be known as the "Massachusetts Turnpike Authority", which shall not be subject to the supervision and regulation of the department of public works or of any other department, commission, board, bureau or agency of the commonwealth except to the extent and in the manner provided in this act. The Authority is hereby constituted a public instrumentality, and the exercise by the Authority of the powers conferred by this act in the construction, operation and maintenance of the turnpike shall be deemed and held to be the performance of an essential governmental function. . . .

. . . . . .

Section 7. *Incidental Powers.*— . . . The Authority may sell the buildings or other structures upon any lands taken by it, or may remove the same, and shall sell, if a sale be practicable, or if not shall lease, if a lease be practicable, any lands or rights or interest in lands or other property taken or purchased for the purposes of this act, whenever the same shall, in the opinion of the Authority, cease to be needed for such purpose. The proceeds of any such sale or lease shall be applied toward the cost of the turnpike or deposited to the credit of the sinking fund for the turnpike revenue bonds issued under the provisions of this act. . . .

2. Massachusetts General Laws (Ter. Ed.) Chapter 79.

Section 6. When a taking is made on behalf of a body politic or corporate other than a corporation described in section seven, the board of officers by whom the order of taking is adopted shall, at the time of the adoption thereof, award the damages sustained by every person in his property by reason of such taking. Such award may be amended by said board of officers at any time prior to the payment thereof by reason of a change in ownership or value of said property before the right to damages therefor has become vested or for other good cause shown. Such damages shall be paid by such body politic or corporate unless other provision is made by law. [As amended through St. 1964, c. 579, § 2.]

. . . . . .

Section 12. The damages for property taken under this chapter shall be fixed at the value thereof before the recording of the order of taking, and in case only part of a parcel of land is taken there shall be included damages for all injury to the part not taken caused by the taking or by the public improvement for which the taking is made; and there shall be deducted the benefit accruing to the part not taken unless it was stated in the order of taking that betterments were to be assessed. In determining the damages to a parcel of land injured when no part of it has been taken, regard shall be had only to such injury as is special and peculiar to such parcel, and there shall be deducted the benefit accruing to such parcel, unless it was stated in the order of taking, or if there was no taking in the order for the establishment, construction, alteration, repair or discontinuance of the public improvement which caused the injury, that betterments were to be assessed. Whenever the title or interest taken is such that the property will be exempt from taxation so long as it is held and used for

the purposes for which it is taken, the damages for the taking shall include an amount separately determined and stated which shall be estimated to be equal to that portion of the tax assessed upon the property in the year it is taken which, if the tax were apportioned pro rata according to the number of days in such year, would be allocable to the days ensuing after the taking. [As amended through St. 1959, c. 626, § 4.]

. . . . . .

SECTION 14. A person entitled to an award of his damages under this chapter or the body politic or corporate bound to pay the same, whether a petition has or has not been filed or award made under section six, seven, nine or ten, may petition for the assessment of such damages to the superior court of the county in which the property taken or injured was situated. If a single parcel of land so taken or injured lies in more than one county, the petition may be filed in the superior court of either such county, and the court in which such petition is first filed shall have exclusive jurisdiction thereof and shall assess damages as though the land lay entirely in one county; provided, that if a petition for damages has previously been filed under section eleven, the petition to the superior court shall be filed in the same county. If the land injured lies outside the commonwealth, such petition shall be filed in the superior court of the county in which the public improvement which caused the injury is situated.